

CONTRACT NO. _____

CONTRACT FOR PROFESSIONAL SERVICES FOR
[project name]
JOB NO. []

Source of Funds:

\$

Total Certification Requested from County:

\$

THIS CONTRACT is made and entered into this _____ day of _____, 20____, by and between the COUNTY OF MAUI, a political subdivision of the State of Hawaii, whose business address is 200 South High Street, Wailuku, Maui, Hawaii 96793, hereinafter referred to as the "County", and [contracto's name], a [state] corporation, whose address is [mailing address], hereinafter referred to as the "Contractor", and collectively referred to as the "Parties."

R E C I T A L S:

WHEREAS, the County desires to retain and engage the Contractor to provide the services described in this Contract and its attachments, and the Contractor desires to render such services for, and on behalf of, the County; and

WHEREAS, this Contract is for professional services as defined in section 103D-104, Hawaii Revised Statutes ("HRS"), and section 3-122-1, Hawaii Administrative Rules ("HAR"); and

WHEREAS, pursuant to section 46-1.5(4), HRS, the County is authorized to enter into this Contract.

A G R E E M E N T:

NOW, THEREFORE, In consideration of the following mutual promises and agreements set forth, the Parties agree as follows:

1. Scope of Services. The Contractor shall, in a proper and satisfactory manner as determined by County, provide all the services set forth in the Proposal of the Contractor, attached hereto as Exhibit "A", which document is hereby incorporated herein and made a part of this Contract.

2. Term of Contract. This Contract shall start when the notice to proceed is issued and shall end within [] (\$.00) calendar days.

3. Compensation. The Contractor shall be compensated for services rendered and costs incurred under this Contract for a total amount not to exceed [] AND NO/100 DOLLARS (\$.00), inclusive of all taxes, according to the fee schedule as set forth in Exhibit "A."

4. General Terms and Conditions. The Contractor shall comply with the General Terms and Conditions of this Contract which are attached hereto as Exhibit "B" and made a part hereof.

5. Procurement Officer. The Director of Finance shall be the Procurement Officer for all services provided herein.

6. Officer-in-Charge. The Director of [department head] of the County of Maui or a designated representative shall be the Officer-in-Charge for all services provided herein.

7. Conflict. In the event of conflict between this Contract and the incorporated documents, the terms of this Contract shall control first, Exhibit "B" second, and Exhibit "A" last.

IN WITNESS WHEREOF, the County has caused this Contract to be executed on its behalf by its Director of Finance, and the Contractor has executed this Contract on Contractor's own behalf on the day and year first written above.

COUNTY OF MAUI:

By _____
KALBERT K. YOUNG
Its Director of Finance

CONTRACTOR:

(Corporate Seal)

By _____
(Signature)

(Print Name)

Its _____
(Title)

By _____
(Signature)

(Print Name)

Its _____
(Title)

Approval Recommended:

Director of

Approved as to Form and Legality:

TRACI FUJITA VILLAROSA
First Deputy Corporation Counsel
C:\Documents and Settings\cbbar\Desktop\greg\profsvcs.wpd

STATE OF _____)
) SS.
_____)

On this _____ day of _____, 20____, before me appeared _____, to me personally known, who, being by me duly sworn, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Notary Public, State of _____

Print Name

My commission expires: _____

EXHIBIT "B"

COUNTY OF MAUI GENERAL TERMS AND CONDITIONS PROFESSIONAL SERVICES CONTRACTS

Section 1 - Definitions

When used in these General Terms and Conditions or elsewhere in this Contract, the following terms, or pronouns used in place of them, shall have the meaning ascribed to them in this section, unless it is apparent from the context that a different meaning is intended:

1.1 **County.** The County of Maui, State of Hawaii.

1.2 **Contractor.** Any individual, partnership, corporation, or joint venture engaged by the County to perform the services under this Contract.

1.3 **Contract.** The written agreement covering the performance of services by the Contractor. It shall include all of the Contract documents, including but not limited to the basic Contract, these General Terms and Conditions, and any exhibits attached thereto and incorporated therein. It shall also include all modifications of this Contract by supplemental agreements thereto in writing and written orders of the Procurement Officer and Officer-in-Charge.

1.4 **Designs and Plans.** Any and all designs, plans, construction drawings, specifications, cost estimates, work schedules, proposals, studies, reports, and other similar items.

1.5 **Professional Services.** Services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, public finance bond underwriting, public finance bond investment banking, or any other practice defined as professional by the laws of this State or the professional and scientific occupation series contained in the United States Office or Personnel Management's Qualifications Standards Handbook.

Section 2 - Award and Execution of Contract

2.1 **Award of Contract.** The Contractor, upon being selected to render certain services, will be notified of commission by the Officer-in-Charge. Said notice shall not be construed to be authorization to proceed with the performance of services under this Contract. Any services performed by the Contractor prior to

the date indicated in the notice to proceed from the Officer-in-Charge shall be at the Contractor's own risk.

2.2 Execution of Contract. Prior to the drafting of this Contract, discussions may be held between the Parties relative to the extent of the services to be performed by the Contractor and other pertinent matters. The Procurement Officer will submit this Contract to the Contractor for review and signature. If the Contractor is an individual or partnership, the Contractor shall sign this Contract before a notary public. If the Contractor is a corporation, the Contractor shall cause this Contract to be signed before a notary public by an officer authorized to do so and shall affix to this Contract its corporate seal, together with a certificate, resolution or other instrument vesting such officer with authority to sign this Contract on the corporation's behalf. This signed Contract shall be returned to the Procurement Officer for signature and further processing.

2.3 Contract Not Binding Unless Properly Executed and Appropriation Available. This Contract shall not be binding or of any force until said Contract has been fully and properly signed by all of the parties thereto and approved by the Procurement Officer as to availability of funds in the amount and for the purpose set forth therein.

Section 3 - Legal Relations and Responsibility

3.1 Independent Contractor. The Contractor shall perform this Contract as an independent contractor and shall not be entitled to any benefits and privileges of an employee of the County of Maui for purposes including, but not limited to, the County's Civil Service System, fringe benefits, unemployment benefits, worker's compensation benefits, federal and state taxes, social security tax, medicare tax, FICA tax and any other employment taxes.

3.2 Contractor's Inability to Contract for County. Notwithstanding anything herein contained to the contrary, Contractor shall not have the right to make any contracts or commitments for, or on behalf of, the County without first obtaining written consent of the County.

3.3 Insurance.

(a) Workers' Compensation. Contractor and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain and require Contractor's sub-contractors (if any) at their own expense to procure and maintain in full force at all times during the term of this Agreement, Workers' Compensation, Temporary Disability, and other similar insurance required by state or federal laws. Permissible self-insurance will be acceptable subject to submission of a copy of appropriate governmental

authorization and qualification by Contractor and anyone acting under its direction or control or on its behalf.

In addition, Contractor and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain and require Contractor's sub-contractors (if any) at their own expense to procure and maintain in full force at all times during the term of this Agreement, employers' Liability insurance with minimum limits for bodily injury from accident of FIVE HUNDRED THOUSAND DOLLARS (\$500,000), or such other limit acceptable to the County, - each accident; for bodily injury from disease of FIVE HUNDRED THOUSAND DOLLARS (\$500,000), or such other limit acceptable to the County, - each employee; and for bodily injury from disease of FIVE HUNDRED THOUSAND DOLLARS (\$500,000), or such other limit acceptable to the County, - each policy limit.

(b) Commercial General Liability Insurance. Contractor and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain and require Contractor's sub-contractors (if any) at their own expense to procure and maintain in full force at all times during the terms of this Agreement, Commercial General Liability insurance with a bodily injury and property damage combined single limit of liability of at least ONE MILLION DOLLARS (\$1,000,000), or such other limit acceptable to the County, for any occurrence. Such insurance shall include coverage in like amount for products/completed operations, contractual liability, and personal and advertising injury. "Claims made" policies are not acceptable under this section.

(c) Automobile Liability Insurance. Contractor and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain and require Contractor's sub-contractors (if any) at their own expense to procure and maintain in full effect at all times during the term of this Agreement, Automobile Liability insurance with a bodily injury and property damage combined single limit of at least ONE MILLION DOLLARS (\$1,000,000), or such other limit acceptable to the County, per accident.

(d) County as Additional Insured. Insurance policies providing the insurance coverage required in this section (except for Workers' Compensation) shall name County, County's agents, and County's employees as additional insureds for any claims arising from Contractor's activities under this Agreement. Coverage must be primary in respect to the additional insured. Any other insurance carried by County shall be excess only and not contribute with this insurance. Such policies or certificates showing the above coverage shall be deposited with County within five (5) days of the execution of this Agreement and shall contain the following statement:

"Thirty (30) days' written notice of cancellation or change will be given to County of Maui, 200 High Street, Wailuku, Hawaii 96793, before any cancellation or change

of this policy will be effective. This insurance includes coverage for the liability assumed by the insured as Contractor under the Agreement between the insured and County of Maui, dated _____."

3.4 Professional Liability Insurance. For professional services contracts the Contractor shall furnish the Procurement Officer upon execution of this Contract with a copy of the insurance policy or policies and certificate of insurance covering the Contractor and the Contractor's employees or agents in an amount not less than FIVE HUNDRED THOUSAND AND NO/DOLLARS (\$500,000.00), or such other limit acceptable to the County, for liability arising out of errors, omissions, or negligence in the performance of professional services under this Contract.

When a subcontractor is utilized, the Contractor shall furnish or require the subcontractor to furnish the Procurement Officer upon execution of this Contract with a copy of a policy or policies of insurance and certificate of insurance covering the subcontractor and the subcontractor's employees or agents in the same amount and for the same liability specified above.

Each policy required above shall contain an endorsement to the effect that it is not subject to cancellation until the expiration of thirty (30) calendar days after written notice of such an intention is furnished to the Procurement Officer.

Where the Contractor or subcontractor has on file with the Procurement Officer a copy of professional liability insurance policy or policies as herein required, the insurance requirement for such Contractor or subcontractor shall be deemed to have been met upon the Contractor or subcontractor furnishing to the Procurement Officer evidence that such policy is in full force and effect and that the amount thereof is not less than such amount specified above.

In the event of cancellation or termination of any policy required above or any substitute policy as provided for hereinafter, the Contractor or the subcontractor, as the case may be, shall immediately furnish the Procurement Officer with a substitute policy of insurance in the same amount and for the same liability specified above.

3.5 Indemnification. To the extent permitted by law, the Contractor shall indemnify and hold harmless the County, its employees, officers and agents from any liability, damages, or losses, including without limitation reasonable attorneys' fees, or claims, actions, or proceedings, arising from the negligence, errors, or omissions of the person or entity, or the person's or entity's employees, officers, or agents in the performance of their professional services. The Contractor's obligations under this

Section shall survive and shall continue to be binding upon Contractor notwithstanding the expiration, termination or surrender of this Contract.

3.6 Absence of Interest. The Contractor covenants that it currently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Contract. The Contractor further covenants that in the performance of this Contract, no person having such interest shall be employed.

3.7 Laws and Regulations. The Contractor shall keep fully informed of all applicable federal, state and county laws, ordinances, codes, rules and regulations, governmental general and development plans and all changes thereto.

The Contractor shall comply with all such laws, ordinances, codes, rules, regulations, design standards and criteria, governmental general and development plans. If any discrepancy or inconsistency is discovered between this Contract and any such law, ordinance, code, rule, regulation, design standard, design criterion, and governmental general and development plans, the Contractor shall immediately report the same in writing to the Officer-in-Charge.

Section 4 - County Responsibility

4.1 Cooperation by the County. The County, through the Officer-in-Charge, shall cooperate fully with the Contractor and will promptly place at the disposal of the Contractor all available pertinent information which the County may have in its possession. The Officer-in-Charge will certify to the accuracy of certain information in writing whenever it is possible to do so. The County does not represent that other information not certified as accurate is so and takes no responsibility therefor, and the Contractor shall rely on such information at the Contractor's own risk.

4.2 Review by the County. The Officer-in-Charge shall review all submittals and other work and data required to be made by the Contractor and reject or approve such submittals in their entirety or approve the same subject to such deletions, additions and revisions as the County may deem necessary and proper. In submittals specified in the special provisions, all items not required by the County to be deleted, added or revised after review by the Officer-in-Charge and not defective by reason or error, omissions or negligence on the part of the Contractor, subcontractors, agents or employers shall be deemed to have been approved.

4.3 Limitation of Liability. The County shall be responsible for damage or injury caused by the County's agents, officers, and employees in the course of their employment to the extent that the County's liability for such damage or injury has been determined by a court or otherwise agreed to by the County, and the County shall pay for such damage or injury to the extent permitted by law and approved by the Maui County Council. The County's total liability under this Contract, if any, is strictly limited to the provisions in this paragraph.

Section 5 - Performance of Contract.

5.1 Time. Time is of the essence herein. Performance of the services under this Contract shall commence on the commencement date designated in the notice to proceed and the services described herein shall be completed within the time specified.

5.2 Prosecution of the Work. The Contractor shall be available upon reasonable demand to discuss the progress of the services being performed under this Contract. All questions arising during the performance of this Contract which must be resolved by the Procurement Officer or Officer-in-Charge shall be brought to their immediate attention by Contractor.

5.3 Authority of the Procurement Officer and Officer-In-Charge. Any question or dispute concerning any provision of this Contract which may arise during its performance shall be decided by the Officer-in-Charge. The decisions of the Officer-in-Charge shall be final and binding upon all Parties unless the same is fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence, provided that decisions on questions or disputes relating to acceptance of the services performed under this Contract, suspension or termination of this Contract, extension of time, reduction or increase in the compensation of the Contractor and payment shall become final and binding upon all Parties only upon approval of the Procurement Officer, and provided further that nothing herein shall be construed as making final and binding any decision of the Officer-in-Charge and/or Procurement Officer on a question of law. Pending final decision of any dispute or question, the Contractor shall proceed diligently with the performance of services under this Contract in accordance with the decision of the Officer-in-Charge and/or Procurement Officer. [HAR §3-126-31]

5.4 Findings Confidential. Any reports, information, data, given to, or prepared or assembled by, the Contractor under this Contract, which the County deems confidential, shall not be made available to any individual or entity by the Contractor without the prior written approval of the Officer-in-Charge.

5.5 **Ownership Vested in County.** It is expressly understood that any and all equipment, materials, data, information, results and any other thing derived or obtained directly or indirectly as a result of this Contract, including, but not limited to, equipment, materials, data, information, and results shall be the sole and exclusive property of the County and that the Contractor shall have no interest, right or title to or in any of the foregoing.

5.6 **Pollution.** In accordance with Section 103D-409, Hawaii Revised Statutes, the Contractor shall control any pollution in accordance with applicable federal, state, and county regulations when pollution is encountered in the performance of this Contract. Contractor shall immediately notify the Officer-in-Charge if pollution is encountered in the performance of this Contract.

5.7 **Best Efforts.** Contractor agrees that it will, at all times, faithfully, industriously, and to the best of Contractor's ability, experience and talents, perform all of the duties that may be required of Contractor pursuant to the express and implicit terms hereof to the reasonable satisfaction of the County, as determined by the Officer-in-Charge.

Section 6 - Compensation

6.1 **Compensation.** The Contractor shall be paid the amount stated in this Contract less any reduction in compensation and plus any increase in compensation pursuant to the contract change order and modification sections herein, as full compensation for the performance of the services under this Contract.

6.2 **Retainage.** The County may retain a portion of the amount due under this Contract to the Contractor to insure proper performance of this Contract, provided that the sum withheld shall not exceed five percent of the amount due the Contractor and that after fifty percent of this Contract is completed and progress is satisfactory, no additional sum shall be withheld; provided further that if progress is not satisfactory, the Procurement Officer may continue to withhold as retainage sums not exceeding five percent of the amount due the Contractor; provided further that the retainage shall not include sums deducted as liquidated damages from moneys due or that may become due the Contractor under this Contract.

6.3 **Progress Payment.** The Contractor's compensation may be paid in periodic progress payments as set forth in this Contract.

6.4 **Death or Disability of Contractor.** In the case of an individual Contractor, if the Contractor dies or becomes physically or mentally disabled, the Contractor or the Contractor's estate

shall be compensated in the same proportion of the compensation under this Contract as the services performed bear to the services to be performed under this Contract.

6.5 Acceptance and Final Payment. Final payment will be made only after the issuance of a notice of final approval and acceptance by the Officer-in-Charge advising the Contractor of the satisfactory fulfillment of the terms of this Contract, receipt of a certificate from the State Director of Taxation pursuant to Section 103-53, Hawaii Revised Statutes, as amended, and provided that the County Director of Finance has determined that the Contractor has fully satisfied all outstanding debts to the County. Acceptance by the Contractor of the final payment shall constitute payment in full for all services performed under this Contract.

6.6 Campaign Contributions Prohibited. It is understood and agreed by the Parties that no portion of the Contractor's compensation to be paid under the terms of this Contract shall be used as a campaign contribution.

6.7 Authority to Withhold Money Due or Payable. The Procurement Officer may withhold such amounts from the money due or to become payable under this Contract to the Contractor, or any assignee thereof, as may be necessary to protect the County against liability, to satisfy the obligations of the Contractor to the County, employees, subcontractors and material men who have performed labor or furnished material and equipment under this Contract, or to satisfy any outstanding debts owed to the County by the Contractor and may make such payments from such amounts as may be necessary to discharge such obligations, satisfy County debts and protect the County.

Section 7 - Change Orders

7.1 Change Clause. By written order, at any time, and without notice to any surety, the Procurement Officer may, unilaterally, order of the Contractor:

- (A) Changes in the work within the scope of this Contract; and
- (B) Changes in the time of performance of this Contract that do not alter the scope of the contract work. [HAR 3-125-2]

7.2 Adjustments of Price or Time for Performance. If any change order increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the "price adjustment" clause of this Contract or as negotiated. Failure of the parties to agree to an adjustment shall not excuse the Contractor from proceeding with the contract as changed, provided that the Procurement Officer promptly and duly

makes the provisional adjustments in payment or time for the direct costs of the work as the County deems reasonable. The right of the Contractor to dispute the contract price or time required for performance or both shall not be waived by its performing the work, provided however, that it follows the written notice requirements for disputes and claims established by this Contract. [HAR 3-125-2]

7.3 Time Period for Claim. Within ten days after receipt of a written change order, unless the period is extended by the Procurement Officer in writing, the Contractor shall respond with a claim for an adjustment. The requirement for a timely written response cannot be waived and shall be a condition precedent to the assertion of a claim. [HAR 3-125-2]

7.4 Claim Barred After Final Payment. No claim by the Contractor for an adjustment hereunder shall be allowed if written response is not given prior to final payment under this Contract. [HAR 3-125-2]

7.5 Claims Not Barred. In the absence of a change order, nothing in this clause shall be deemed to restrict the Contractor's right to pursue a claim under this Contract or for breach of contract. [HAR 3-125-2]

Section 8 - Modifications

8.1 Contract Modification. By a written order, at any time, and without notice to any surety, the Procurement Officer, subject to mutual agreement of the parties to the contract and all appropriate adjustments, may make modifications within the general scope of this Contract to include any one or more of the following:

- (A) Drawings, designs, or specifications, for the goods to be furnished;
- (B) Method of shipment or packing;
- (C) Place of delivery;
- (D) Description of services to be performed;
- (E) Time of performance (i.e., hours of the day, days of the week, etc.);
- (F) Place of performance of the services; or
- (G) Other provisions of the contract accomplished by mutual action of the parties to the contract.

8.2 Adjustments of Price or Time for Performance. If any modification increases or decreases the Contractor's cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this Contract or as negotiated.

8.3 Claim Barred After Final Payment. No claim by the Contractor for an adjustment hereunder shall be allowed if written agreement of modification is not made prior to final payment under this Contract.

8.4 Claims Not Barred. In the absence of a contract modification, nothing in this clause shall be deemed to restrict the Contractor's right to pursue a claim under this Contract or for a breach of contract.

Section 9 - Stop Work Orders

9.1 Order To Stop Work. The Procurement Officer, may, by written order to the Contractor, at any time, and without notice to any surety, require the Contractor to stop all or any part of the work called for by this Contract. This order shall be for a specified period not exceeding sixty days after the order is delivered to the Contractor, unless the parties agree to any further period. Any order shall be identified specifically as a stop work order issued pursuant to this section. Upon receipt of an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the Procurement Officer shall either:

- (A) Cancel the stop work order; or
- (B) Terminate the work covered by the order as provided in the "termination for default" clause or the "termination for convenience" clause of this Contract.

9.2 Cancellation or Expiration of the Order. If a stop work order issued under this section is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the Contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if:

- (A) The stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this Contract; and
- (B) The Contractor asserts a claim for an adjustment within thirty days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify the action, any claim asserted may be received and acted upon at any time prior to final payment under this Contract.

9.3 Termination of Stopped Work. If a stop work order is not canceled and the work covered by the order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowable by adjustment or otherwise.

9.4 **Adjustment of Price.** Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the "price adjustment" clause of this Contract.

Section 10 - Variations in Quantities.

Upon the agreement of the parties, the quantity of goods or services or both specified in definite quantity goods and services contracts may be increased by a maximum of ten per cent provided (1) the unit prices will remain the same except for any price adjustments otherwise applicable and (2) the Procurement Officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.

Section 11 - Price Adjustment For Goods and Services Contracts.

11.1 **Price Adjustment.** Any adjustment in contract price pursuant to a clause in this Contract shall be made in one or more of the following ways:

(A) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(B) By unit prices specified in the contract or subsequently agreed upon;

(C) By the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;

(D) In such other manner as the parties may mutually agree; or (E) In the absence of agreement between the parties, by a unilateral determination by the Procurement Officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the Procurement Officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, Hawaii Administrative Rules, as amended.

11.2 **Submission of Cost or Pricing Data.** The Contractor shall provide cost or pricing data for any price adjustments subject to the provisions of sub-chapter 15, chapter 3-122, Hawaii Administrative Rules, as amended.

Section 12 - Novation or Change of Name

12.1 **No Assignment.** No County contract is transferable, or otherwise assignable, without the written consent of the Procurement Officer provided that a Contractor may assign monies receivable under a contract after due notice to the County.

12.2 Recognition of a Successor in Interest; Assignment. When in the best interest of the County, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and the County shall agree that:

(A) The transferee assumes all of the transferor's obligations; (B) The transferor remains liable for all obligations under the contract but waives all rights under the contract as against the County; and

(C) The transferor shall continue to furnish, and the transferee shall also furnish, all required bonds.

12.3 Change of Name. When a Contractor requests to change the name in which it holds a contract with the County, the Procurement Officer shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting Contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

Section 13 - Claims Based on the Procurement Officer's Actions or Omissions

If any action or omission on the part of the Procurement Officer or designee of the officer, requiring performance changes within the scope of the contract constitutes the basis for a claim by the Contractor for additional compensation, damages, or an extension of time for completion, the Contractor shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the Contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

(A) The Contractor shall have given written notice to the Procurement Officer or designee of the officer: (i) Prior to the commencement of the work involved, if at that time the Contractor knows of the occurrence of the action or omission; (ii) Within thirty days after the Contractor knows of the occurrence of the action or omission, if the Contractor did not have knowledge prior to the commencement of the work; or (iii) Within further time as may be allowed by the procurement officer in writing;

(B) This notice shall state that the Contractor regards the act or omission as a reason which may entitle the Contractor to additional compensation, damages, or an extension of time. The procurement officer or designee of the officer, upon receipt of the notice may rescind the action, remedy the omission, or take other steps as may be deemed advisable in the discretion of the Procurement Officer or designee of the officer;

(C) The notice required by subparagraph (A) describes as clearly as practicable, at the time, the reasons why the Contractor believes that additional compensation, damages, or an extension of time may be remedies to which the Contractor is entitled; and (D) The Contractor maintains and, upon request, makes available to the

Procurement Officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with the changes.

Nothing herein contained, however, shall excuse the Contractor from compliance with any rules of law precluding any County officers and any contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the contract.

Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this Contract.

Section 14 - Termination for Default in Goods and Services Contracts

14.1 Default. If the Contractor refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this Contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this Contract, the Procurement Officer may notify the Contractor in writing of the delay or non-performance, and if not cured in ten days or any longer time specified in writing by the Procurement Officer, the Procurement Officer may terminate the Contractor's right to proceed with the contract or a part of the contract as to which there has been delay or other breach of contract. In the event of termination in whole or in part, the Procurement Officer may procure similar goods or services in a manner and upon terms deemed appropriate by the Procurement Officer. The Contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

14.2 Contractor's Duties. Notwithstanding termination of the contract and subject to any directions from the Procurement Officer, the Contractor shall take timely and necessary action to protect and preserve property in the possession of the Contractor in which the County has an interest.

14.3 Compensation. Payment for completed goods delivered and accepted by the County shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Procurement Officer; if the parties fail to agree, the Procurement Officer shall set an amount subject to the Contractor's rights under chapter 3-126, Hawaii Administrative Rules, as amended. The County may withhold from amounts due the Contractor as the Procurement Officer deems to be necessary to protect the County against loss because of outstanding liens or claims of former lien holders and to reimburse the County

for the excess costs incurred in procuring similar goods and services.

14.4 Excuse for Nonperformance or Delayed Performance. Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of this Contract in accordance with its terms, if the Contractor has notified the Procurement Officer within fifteen days after the cause of the delay and the failure arises out of causes including but not limited to the following: acts of God; acts of the public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if the failure arises out of causes similar to those set forth above, the Contractor shall not be deemed to be in default, unless the goods or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the contract requirements. Upon request of the Contractor, the Procurement Officer shall ascertain the facts and extent of the failure, and, if the Procurement Officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the Contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the County under the "Termination for Convenience" clause in fixed-price contracts, and "Termination" in cost-reimbursement contracts. As used in this paragraph, the term "subcontractor" means subcontractor at any tier.

14.5 Additional Rights and Remedies. The rights and remedies provided in this Contract are in addition to any other rights and remedies provided by law.

Section 15 - Termination for Convenience

15.1 Termination for Convenience. The Procurement Officer may, when the interests of the County so require, terminate this Contract in whole or in part, for the convenience of the County. The Procurement Officer shall give written notice of the termination to the Contractor, specifying the part of the contract terminated and when termination becomes effective.

15.2 Contractor's Obligations. The Contractor shall incur no further obligations in connection with the terminated work, and on the dates set in the notice of termination the Contractor shall stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and

claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the County's approval. The Procurement Officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the County. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

15.3 Right to Goods. The Procurement Officer may require the Contractor to transfer title and deliver to the County in the manner and to the extent directed by the Procurement Officer:

- (A) Any completed goods; and
- (B) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights, hereinafter called "manufacturing material," as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this Contract.

The Contractor shall, upon direction of the Procurement Officer, protect and preserve property in the possession of the Contractor in which the County has an interest. If the Procurement Officer does not exercise this right, the Contractor shall use the Contractor's best efforts to sell the goods and manufacturing materials. Use of this section in no way implies that the County has breached the contract by exercise of the "termination for convenience" clause.

15.4 Compensation. (A) The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by sub-chapter 15, chapter 3-122, Hawaii Administrative Rules, as amended, bearing on the claim. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the Contractor, if at all, an amount set in accordance with subparagraph (C).

(B) The Procurement Officer and the Contractor may agree to settlement provided the Contractor has filed a termination claim supported by cost or pricing data to the extent required by sub-chapter 15, chapter 3-122, Hawaii Administrative Rules, as amended, and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the County, the proceeds of any sales of goods and manufacturing materials under the "right to goods" clause of this section, and the contract price of the work not terminated.

(C) Absent complete agreement under subparagraph (B), the Procurement Officer shall pay the Contractor the following amounts, provided payments agreed to under subparagraph (B) shall not duplicate payments under this subparagraph for the following: (i) Contract prices for goods or services accepted under the contract;

(ii) Costs incurred in preparing to perform and performing the terminated portion of the work plus a five per cent markup on actual direct costs on the portion of the work, the markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss; (iii) Subject to the prior approval of the Procurement Officer, the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to the "Contractor's obligations" clause of this section. Subcontractors shall be entitled to a markup of no more than ten per cent on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with clause (ii) of subparagraph (C); (iv) The total sum to be paid the Contractor under this subparagraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph (B), and the contract price of work not terminated.

(D) Cost claimed, agreed to, or established under subparagraphs (B) and (C) shall be in accordance with chapter 3-123, Hawaii Administrative Rules, as amended.

Section 16 - Prompt Payment by Contractors to Subcontractors

Any money, other than retainage, paid to a Contractor shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and, upon final payment to the Contractor, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.

Section 17 - Remedies

17.1 **General.** Any dispute arising under or out of this Contract is subject to chapter 3-126, Hawaii Administrative Rules, as amended.

17.2 **Disputes.** (1) All controversies between the County and the Contractor which arise under, or are by virtue of, this Contract and which are not resolved by mutual agreement shall be decided by the Procurement Officer in writing, within ninety calendar days after a written request by the Contractor for a final decision concerning the controversy; provided that if the Procurement Officer does not issue a written decision within

ninety calendar days after written request for a final decision, or within such longer period as may be agreed upon by the Parties, then the Contractor may proceed as if an adverse decision had been received. (2) The Procurement Officer shall immediately furnish a copy of the decision to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. (3) Any such decision shall be final and conclusive, unless fraudulent, or unless the Contractor brings an action seeking judicial review of the decision in the Circuit Court of the Second Circuit, State of Hawaii, County of Maui, within the six months from the date of receipt of the decision. (4) The Contractor shall comply with any decision of the Procurement Officer and proceed diligently with performance of this Contract pending final resolution by the Circuit Court of the Second Circuit, State of Hawaii, County of Maui, of any controversy arising under, or by virtue of, this Contract, except where there has been a material breach of contract by the County; provided that in any event the Contractor shall proceed diligently with the performance of this Contract where the Chief Procurement Officer has made a written determination that work under this Contract is essential to the public health and safety.

Section 18 - Miscellaneous Provisions

18.1 **Severability.** If any provision of this Contract is held invalid, the other provisions of this Contract shall not be affected thereby. If the application of this Contract or any of its provisions as to any person or circumstance is held invalid, the application of this Contract and its provisions as to other persons or circumstances shall not be affected thereby.

18.2 **Entire Agreement.** This Contract contains the complete agreement concerning the subject arrangement between the Parties and shall, as of the effective date hereof, supersede all other agreements between the Parties. The Parties stipulate that neither has made any representations with respect to the subject matter, execution and delivery of this Contract except as such representations are specifically set forth herein. Each Party acknowledges that the Party has relied on the Party's own judgment in entering into this Contract. The Parties further acknowledge that any payments or representations that may have previously been made by either of them to the other are of no effect and that neither has relied thereon in connection with its dealing with the other.

18.3 **Notices.** Any written notice required to be given by a party to this Contract shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid to the party's address listed in this Contract. A notice shall be deemed to have been received three (3) days after mailing or at

the time of actual receipt, whichever is earlier. The Contractor shall notify the County in writing of any change of address.

18.4 **Assistance of Legal Counsel.** The Parties have carefully read and fully understand all of the provisions and effects of this Contract. The Parties shall consult with their respective counsel if any provision of this Contract is not fully understood. The Parties are voluntarily entering into this Contract and neither Party has made representations concerning the terms or effects of this Contract other than those contained herein.

18.5 **Applicable Law and Venue.** This Contract shall be governed by the laws of the State of Hawaii. Any action or court proceeding which may arise from this Contract shall be heard in the Circuit Court of the Second Circuit, State of Hawaii, County of Maui.

END OF EXHIBIT